No. 1127

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SUPREME COURT OF THE UNITED STATES

October Term, 1945

Hastings Manufacturing Company,
a Michigan corporation,
Petitioner,

v.

Federal Trade Commission,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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REARDON-PARSHALL CO.

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Argument:

A. Petitioner's policy of granting "obsolescence" protection, the guarantee of profits, and loans to its jobbers, did not constitute an unfair method of competition in commerce and an unfair or deceptive act or practice within the meaning of the Federal Trade Commission Act 11

B. In the light of existing competitive conditions petitioner's practices of giving "obsolescence" protection, guarantee of profits, and loans to jobbers did not constitute unfair methods of competition in commerce and unfair or deceptive acts or practices within the provisions of the Federal Trade Commission Act 12

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C. The Federal Trade Commission has no authority to issue a second complaint containing identical charges and allegations of fact and covering the exact same period of time as a former complaint which, after hearing, had been dismissed "without prejudice" 15

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I. Summary Statement of Matter Involved.

This is a petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment of the Court affirming an order to cease and desist, entered by the Federal Trade Commission.

Petitioner, Hastings Manufacturing Company, is a Michigan corporation, with its principal offices and factory at Hastings, Michigan. In 1923 it started the manufacture of piston rings, solely for the automotive replacement trade, and has since been so engaged. Up until the latter part of 1935, petitioner and its competitor manufacturers made and sold only a cast-iron, or conventional type oil ring. At that time, petitioner came out with a ventilated steel oil ring under the name of "Steel-Vent," which had decided advantages. At that time petitioner was one of the small ring manufacturers and not a major factor in the industry. Subsequently all the major competitor ring manufacturers came out with a steel ring similar in character (R. 70; 573-4).

Piston rings for the replacement trade are sold by manufacturers to or through wholesale jobbers or replacement parts dealers who, in addition to one or more ring lines, usually carry a complete line of automotive replacement parts and accessories. The general practice in the replacement ring industry is for the manufacturer to dispose of its rings to its jobbers under so-called consignment contracts, where rings up to a specified amount, or "par value," are consigned to the jobber in the nature of a basic inventory, and any rings taken by that jobber in excess of such consigned stock are paid for by the jobber and become his property. This excess is termed "overage." It has always been the general practice in the industry for a manufacturer to take back for credit or exchange for new rings any of its rings (including "overage") in the hands of a jobber actively representing it, regardless of the character of those rings and irrespective of whether they were current or outmoded types (R. 70; 289; 291; 340; 390-2; 575).

When petitioner attempted to get jobbers to handle its new "Steel-Vent" ring it was met with threats by competitor manufacturers, whose line the jobber was then handling, to "pull" its line and make the jobber "swallow" his overage if he took on or refused to give up the Hastings line (R. 213; 438-440; 461; 578). In order to meet this situation, Hastings, about 1936, established a general policy of protecting all its jobbers against loss by reason of that jobber discontinuing a competitive line or by reason of a competitive manufacturer "pulling" its line. This was termed "obsolescence" protection. Under this policy, Hastings would take off the jobber's hands for credit at the jobber's cost any competitive rings which that jobber owned outright and which the manufacturer of those rings refused to take back unless the jobber gave up or refused to handle Hastings rings. All such rings were inventoried by Hastings and were not re-sold at any price. They were destroyed (R. 577-584). In a very few instances Hastings agreed to guarantee a jobber that his gross profit from Hastings rings would exceed that of the preceding year when he handled a competitive ring line. In every instance that such an offer was made it was to offset the threat of a competitor manufacturer to pull its line if the jobber took on or refused to give up Hastings. Hastings was never called upon to pay and never paid anything under such a guarantee (R. 753-5).

Petitioner also made loans to certain of its jobbers. All such loans, with the exception of one or two discharged by operation of law, have been paid in full or are currently being paid (C.E. 34 and 122).

Under date of February 10, 1940, the Federal Trade Commission issued its complaint (R. 7; 63) against Hastings, charging that its practice of "obsolescence" protection, guarantees, and loans constituted unfair trade practices within the provisions of the Federal Trade Commission Act. An answer was filed, hearing held, testimony taken, and a report upon the evidence filed by the Trial Examiner and, subsequently, a memorandum brief was filed in support of the complaint by the Chief Counsel and Trial Attorney for the Commission. On December 27, 1940, the Commission entered its order that said "proceeding be, and the same hereby is, dismissed without prejudice" (R. 16; 64). On the same day, the Commission issued a second complaint against petitioner which contained the identical allegations of fact and charges contained in the previous complaint and covered the exact same period of time (R. 57; 64). (A second count under the Robinson-Patman Act was added, which is not material to this case since, after hearing and argument, it was dismissed by the Commission.) Petitioner filed its Motion to Dismiss and, in the alternative, its Answer (R. 63-5). This motion was never passed upon by the Commission. Over petitioner's objection (R. 765-6) hearings were held and testimony taken. Under date of December 9, 1944, the Commission issued its order to "cease and desist" (R. 81).

Your petitioner presents to this Court, and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Circuit Court of Appeals.

II. Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Title 28 U.S.C.A. Sec. 347 (a).

The statute of the United States involved in this proceeding is known as the Federal Trade Commission Act (Act of September 26, 1914, 38 Stat. 717, 719-721, as amended by Act of March 21, 1938, 52 Stat. 111-114, and by §1107 (f) of Act of June 23, 1938, 52 Stat. 1028; 15 U.S.C.A. §45). The Act of February 13, 1925, cited above, provided that cases arising under this section shall be included among the cases to which Sections 346 and 347 of Title 28 Judicial Code, relating to certiorari by the United States Supreme Court, shall apply.

The judgment of the Circuit Court of Appeals for the Sixth Circuit now sought to be reviewed was entered by the said Court on February 4, 1946 (R. 785) and is final and erroneous. No petition for rehearing was filed.

III. Questions Presented.

(a) In the absence of any showing of fraud or deception on the public, or of disparagement or demoralization of the competitive market, petitioner's practice of granting "obsolescence" protection, guarantee of profits, and loans to jobbers, did not constitute unfair methods of competition and unfair or deceptive acts or practices within the meaning of the Federal Trade Commission Act.

(b) Petitioner's practices, when introducing a new and improved product, of protecting jobbers against

threats of reprisal by large competitor manufacturers if the jobbers handled or refused to give up petitioner's product, said practices consisting of buying competitive rings owned by the jobber, guaranteeing profits, and making loans to the jobbers, did not constitute unfair methods of competition in commerce and unfair or deceptive acts or practices within the meaning of the Federal Trade Commission Act.

(c) After the issuance of a complaint, filing of an answer, and hearings thereon, the Federal Trade Commission is without authority or jurisdiction under the Federal Trade Commission Act to dismiss the same "without prejudice" and immediately issue a new complaint against the same respondent which contains identical charges and allegations of fact and covers exactly the same period of time.

IV. Reasons Relied on for the Allowance of the Writ.

(a) This case presented for the first time the question as to whether the practice of purchasing at the jobber's cost competitor's products by a manufacturer, in the absence of fraud, deception and discrimination and where such products are not resold at cut prices or at any price, constitutes an unfair method of competition in commerce and an unfair or deceptive act or practice within the meaning of the Federal Trade Commission Act. It also presented for the first time the question whether the guarantee of profits, where no payment was ever required or made thereunder by petitioner, and loans by petitioner to its jobbers, constitute unfair methods of competition and unfair or deceptive acts or practices within the provisions of the Act. It is submitted that this is an important question of federal law which has not been, but should be, settled by this Court.

(b) The decision of the Circuit Court of Appeals in this case decided a federal question in a way probably in conflict with applicable decisions of that court on the same matter. The Sixth Circuit, in this case, completely disregarded the competitive conditions in the industry which gave rise to the practices complained of. Yet that Court, in *Ford Motor Co. v. Federal Trade Commission* (1941), 120 F. (2d) 175, 181 said, ". . . What constitutes 'unfair methods of competition' must be decided in particular instances upon incidences in light of existing competitive conditions."

(c) The Circuit Court of Appeals for the Sixth Circuit has decided in this case an important question of federal law which has not been, but should be, settled by this Court. The case involves the question whether the Federal Trade Commission has authority under the Federal Trade Commission Act and its own Rules to dismiss a complaint "without prejudice" after hearings thereon and immediately issue against the respondent a new complaint containing identical charges and allegations of fact and covering the same period of time.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 9963, Hastings Manufacturing Company, Petitioner, v. Federal Trade Commission, Respondent, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States;

and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

HASTINGS MANUFACTURING COMPANY,

By Laurence A. Masselink,
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Dated April 15, 1946.